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PATENT AND TRADEMARK OFFICE

Kalamazoo Office

January 4, 1995

Direct Dial: (616) 382-9711

VIA FEDERAL EXPRESS

Mr. William F. Caton

Acting Secretary

Federal Communications Commission

1919 M Street, NW, Room 222

Washington, D.C. 20554

Re: Petition for Reconsideration of the Going Forward Rules; MM Docket No. 92-266

Dear Mr. Caton:

Enclosed for filing is the original and nine copies of the Petition for Reconsideration of the 6th Order on Reconsideration in MM Docket No. 92-266. We have also enclosed an additional copy which we request that you return to us after it has been file stamped "Received" by your office.

RECEIVED

JAN 05 1995

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029

Mr. William F. Caton
January 4, 1995
Page 2

If you have any questions or need additional assistance, please contact us.

Very truly yours,

HOWARD & HOWARD

A handwritten signature in black ink, appearing to read "E. E. B.", followed by a long horizontal flourish.

Eric E. Breisach

EEB:mtd
Enclosures

cc: Chairman Reed Hundt
Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Meredith Jones
Blair Levin

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

JAN 05 1995

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In the Matter of)

Implementation of Sections of)
The Cable Television Consumer)
Protection and Competition Act)
of 1992)

MM Docket No. 92-266

Rate Regulation)

**PETITION FOR RECONSIDERATION
OF
SIXTH ORDER ON RECONSIDERATION
(THE GOING FORWARD RULES)
BY
THE SMALL CABLE BUSINESS ASSOCIATION**

**Eric E. Breisach
Christopher C. Cinnamon**

**HOWARD & HOWARD
107 W. Michigan Ave., Suite 400
Kalamazoo, Michigan 49007**

**Attorneys for the Small Cable
Business Association**

Dated: January 4, 1995

TABLE OF CONTENTS

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I. SUMMARY

The Small Cable Business Association, through its attorneys Howard & Howard, reluctantly submits this *Petition for Reconsideration*; a petition that should never have been necessary in the first place. Once again, despite its cooperative efforts to work with the Commission both before and after the going forward rules were released, despite indications that SCBA's concerns would be resolved (even from Chairman Hundt)¹, despite assurances that this Petition for Reconsideration would not be necessary, on the day before the filing deadline, no official action has been announced to rectify the disparate treatment of small systems in the going forward rules.

In a letter to Commission Chairman Reed Hundt dated December 7, 1994² SCBA Chairman David Kinley expressed deep concern over the Commission's apparent *policy of conscious disregard* toward the needs and concerns of small systems and small operators³. The Commission's failure to take timely corrective action with respect to the impact of the going forward rules on small systems reinforces this appearance. As the adage goes, "action speaks louder than words." To date, there has been no public action on this matter.

Small systems operate under a different cost structure than large systems; their per

¹Chairman Hundt, in a December 20, 1994 speech before the Washington Cable Club, said "We're going to move quickly to revise our going forward rules related to headend costs in order to fully reflect the business necessities of small systems."

²A copy of this letter was made part of the record in this proceeding when it was filed with the Commission's Secretary on December 20, 1994.

³The terms "small systems" and "small operators" as used in this *Petition* are not limited to the under-inclusive definitions adopted by the Commission, but rather refer to that broader class of operators and systems needing relief from both the administrative burdens of rate regulation and the insufficient rates developed by regulatory computations.

subscriber capital and operating costs are typically much higher than large systems. Large systems are allowed to charge up to \$0.20 per new channel, exclusive of license fees, to cover their incremental costs and add to operating margins. Small operators, with high per subscriber headend costs, are forced to choose between the \$0.20 operator's cap adjustment or a headend adjustment that, while significant, is typically much lower than the \$0.20 cap. The Commission needs to amend its rules to make the headend cost adjustment additive to the operator's cap and to make the headend cost adjustment available to systems with more than 1,000 subscribers.

II. THE HEADEND COST ADJUSTMENT MUST SUPPLEMENT THE OPERATOR'S CAP

Prior to issuance of the going forward rules in the *Sixth Order On Reconsideration*, MM Docket 92-266 (Released November 18, 1994) ("*Going Forward Order*"), SCBA representatives were consulted by representatives of the Cable Services Bureau and the plan to allow headend cost recovery as an alternative to the operator's cap. Within three hours of being consulted, SCBA, through its attorneys, provided the staff with computations showing that the headend cost add-on rarely exceeded \$0.20 and was typically much less⁴. The staff was advised that the proposal was fatally flawed because while recognizing the high per subscriber headend costs, operators were denied the recovery of other costs and margins by forfeiting the operator's cap adjustment.

When the *Going Forward Order* was released, no mention was made of SCBA's concerns and the basic model remained unchanged. SCBA immediately raised its concerns with senior Cable Bureau staff and several Commissioners. Also, through correspondence that was filed in the record of this proceeding⁵ SCBA continued to raise its concerns about the impact of the *Going Forward Rules* on small systems and operators:

1. In a letter dated December 12, 1994⁶, Eric Breisach of Howard & Howard wrote Susan Cosantino of the Cable Services Bureau outlining the concerns of SCBA and

⁴A revised computation is enclosed behind Tab A.

⁵See letter to Mr. William F. Caton from David Kinley dated December 19, 1994 submitting copies of previous correspondence on the record.

⁶A copy of the letter is enclosed behind Tab A.

providing a revised chart showing that only systems with 250 or fewer subscribers would ever see a headend cost add-on of \$0.20 or higher.

2. In a letter dated December 14, 1994⁷, David Kinley wrote to Meredith Jones reiterating the need for the headend add-on to be in addition to the operator's cap and to not limit the headend cost recovery to systems with 1,000 or fewer subscribers.
3. In a letter dated December 7, 1994⁸, David Kinley wrote to Chairman Reed Hundt to reiterate the foregoing points and to address the Commission's apparent *policy of conscious disregard*.

These issues, as more fully developed in the attached correspondence, remain of key importance and urgency for smaller systems and companies and must be favorably resolved as a precondition to the launch of new services.

⁷A copy of the letter is enclosed behind Tab B.

⁸A copy of the letter is enclosed behind Tab C.

III. SYSTEMS WITH MORE THAN 1,000 SUBSCRIBERS NEED AN ADJUSTMENT FOR HEADEND COSTS

As more fully developed in the chart enclosed behind Tab A, under the Commission's methodology, systems with 1,000 subscribers might have a per subscriber cost of \$0.05 per added channel. A system with 1,500 subscribers still has a cost of \$0.03. The 1,500 subscriber system needs relief as well, yet under the current rules, it is not eligible for relief.

As the chart demonstrates, the computation of headend cost recovery is self-limiting. In other words, since the denominator of the computation is the number of subscribers, the larger the system, the smaller the adjustment until at levels above 10,000 subscribers, the computation rounds to zero and there simply is no headend cost adjustment.

As long as the concept of a headend cost adjustment is sound (and it is), there is no justification to artificially limit the relief -- the computation will limit those who can take advantage of the adjustment.

IV. SUMMARY


The Commission had ample opportunity to eliminate the necessity for this *Petition*. First, it should have incorporated SCBA's concerns and comments into its original rulemaking. Second, the concerns were raised as soon as the sunshine period ended with the release of the *Going Forward Order*. The Commission had ample opportunity to reconsider and act on the matter on its own motion.

It is distressing that a grass-roots organization has to expend time and money because the Commission ignored its concerns in the first place and then cannot act quickly enough to avoid expiration of the period of time during which formal petitions for reconsideration must be filed.

In the future, it is SCBA's hope that the Commission will give greater weight to the legitimate needs and concerns of small operators and small systems before issuing rulemakings, thereby allowing resources to be focused on the substance of rate regulation, not the procedures necessary to have rulemakings changed.

Respectfully submitted,

**SMALL CABLE BUSINESS
ASSOCIATION**

By: 
Eric E. Breisach
Christopher C. Cinnamon

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Kalamazoo Office
December 12, 1994

Direct Dial (616) 382-9711

VIA FACSIMILE

Ms. Susan Cosantino
Cable Services Bureau
Federal Communications Commission
2033 M Street NW
Washington, DC 20554

Re: Going Forward Rules; Resubmission of Small System Headend Add-Ons

Dear Susan:

In response to your request on Friday, we are resubmitting the computation we provided you in October. This computation assumes that operators have paid the full \$5,000 for headend equipment to add one channel. For illustrative purposes a 7 year depreciable life was used. In light of recent Commission decisions, a 10 to 15 year life may be more appropriate. This change, however, would serve to decrease the total pass-through. Therefore, if anything, we have overstated the amount of the pass-through.

To illustrate this fact, we have enclosed a revised chart which shows the impact if the 15 year recovery period is required for headend equipment. In such a circumstance, a system must have 250 or fewer subscribers before it will exceed the cost pass-through of \$0.20. We have also added two additional columns which indicate both the amount of the actual up-front investment that cable operators must make on a per subscriber basis as well as the number of years required to recover the original investment ignoring the time value

Ms. Susan Cosantino
December 12, 1994
Page 2

of money and other cost of capital considerations. As expected, the investment per subscriber can be huge (a minimum of \$5.00 per subscriber for a 1,000 subscriber system) with a recovery period in excess of 8 years. As evidenced by these computations, there is simply no incentive for a small system to add additional channels of programming under the going-forward rules.

To make the going forward rules work for small systems, the Commission needs to make all of the following changes:

1. The headend cost pass-through must be added to the \$0.20 per channel allowed operators in general. As the attached chart indicates, only the smallest systems will ever have an average headend cost pass through that even equals \$0.20. Without this fundamental change, the headend cost pass-through is meaningless for most operators.
2. Headend costs on a per subscriber basis are a problem for systems with more than 1,000 subscribers. As the chart shows, the costs are still significant for two and three thousand subscriber systems. While we appreciate the Commission's desire to limit relief to only those systems needing it, the computation itself is self-limiting. As the chart shows, the computations reduce quickly to \$0.01 per subscriber as system size rises, and eventually round to zero. Restricting it to systems with 1,000 or fewer subscribers owned by small MSOs too narrowly limits relief.

We are grateful that the Commission is revisiting this issue and will provide you with additional information and input as requested.

Very truly yours,

HOWARD & HOWARD



Eric E. Breisach

Enclosure
cc: David Kinley
\\361\\fcc\\susan.d12

Self Limiting Nature Of Headend Expense Computation
(Highest Possible Average-Year Add On)
Potential Going-Forward Rules
Small Cable Business Association
October 1994

System Size	Headend Cost	Monthly Depr (7 yr)	Average Cost of Capital (11.25%)	Total Monthly Cost	Monthly Subscriber Cost	
					Actual	Rounded
500	5,000	59.52	23.44	82.96	0.165923	0.17
1,000	5,000	59.52	23.44	82.96	0.082961	0.08
1,500	5,000	59.52	23.44	82.96	0.055308	0.06
2,000	5,000	59.52	23.44	82.96	0.041481	0.04
3,000	5,000	59.52	23.44	82.96	0.027654	0.03
4,000	5,000	59.52	23.44	82.96	0.020740	0.02
5,000	5,000	59.52	23.44	82.96	0.016592	0.02
6,000	5,000	59.52	23.44	82.96	0.013827	0.01
7,000	5,000	59.52	23.44	82.96	0.011852	0.01
8,000	5,000	59.52	23.44	82.96	0.010370	0.01
9,000	5,000	59.52	23.44	82.96	0.009218	0.01
10,000	5,000	59.52	23.44	82.96	0.008296	0.01
11,000	5,000	59.52	23.44	82.96	0.007542	0.01
12,000	5,000	59.52	23.44	82.96	0.006913	0.01
13,000	5,000	59.52	23.44	82.96	0.006382	0.01
14,000	5,000	59.52	23.44	82.96	0.005926	0.01
15,000	5,000	59.52	23.44	82.96	0.005531	0.01
16,000	5,000	59.52	23.44	82.96	0.005185	0.01
17,000	5,000	59.52	23.44	82.96	0.004880	0.00
18,000	5,000	59.52	23.44	82.96	0.004609	0.00
19,000	5,000	59.52	23.44	82.96	0.004366	0.00
20,000	5,000	59.52	23.44	82.96	0.004148	0.00

Self Limiting Nature Of Headend Expense Computation
(Highest Possible Average—Year Add On)
Going—Forward Rules
** Revised Depreciable Life **
Small Cable Business Association
December 1994

System Size	Headend Cost	FCC Going—Forward Rules					Actual Up—Front Investment Per Subscriber	
		Monthly Depr (15 yr)	Average Cost of Capital (11.25%)	Total Monthly Cost	Monthly Subscriber Cost		Amount	Years To Recover
250	5,000	27.78	23.44	51.22	Actual	Rounded	20.00	8.14
500	5,000	27.78	23.44	51.22	0.204981	0.20	10.00	8.14
750	5,000	27.78	23.44	51.22	0.136657	0.07	6.67	8.14
1,000	5,000	27.78	23.44	51.22	0.081215	0.05	5.00	8.14
1,500	5,000	27.78	23.44	51.22	0.054144	0.03	3.33	8.14
2,000	5,000	27.78	23.44	51.22	0.038008	0.03	2.50	8.14
3,000	5,000	27.78	23.44	51.22	0.017072	0.02	1.67	8.14
4,000	5,000	27.78	23.44	51.22	0.012804	0.01	1.25	8.14
5,000	5,000	27.78	23.44	51.22	0.010343	0.01	1.00	8.14
6,000	5,000	27.78	23.44	51.22	0.008638	0.01	0.83	8.14
7,000	5,000	27.78	23.44	51.22	0.007316	0.01	0.71	8.14
8,000	5,000	27.78	23.44	51.22	0.006402	0.01	0.63	8.14
9,000	5,000	27.78	23.44	51.22	0.005691	0.01	0.56	8.14
10,000	5,000	27.78	23.44	51.22	0.005133	0.01	0.50	8.14
11,000	5,000	27.78	23.44	51.22	0.004638	0.00	0.45	N/A
12,000	5,000	27.78	23.44	51.22	0.004200	0.00	0.42	N/A
13,000	5,000	27.78	23.44	51.22	0.003840	0.00	0.38	N/A
14,000	5,000	27.78	23.44	51.22	0.003538	0.00	0.36	N/A
15,000	5,000	27.78	23.44	51.22	0.003284	0.00	0.33	N/A
16,000	5,000	27.78	23.44	51.22	0.003071	0.00	0.31	N/A
17,000	5,000	27.78	23.44	51.22	0.002893	0.00	0.29	N/A
18,000	5,000	27.78	23.44	51.22	0.002745	0.00	0.28	N/A
19,000	5,000	27.78	23.44	51.22	0.002618	0.00	0.26	N/A
20,000	5,000	27.78	23.44	51.22	0.002511	0.00	0.25	N/A

Note: The "Years to Recover" represents the number of years necessary to recover the initial cash outlay to add a channel of programming using a pass—through calculation which averages the amount of the pass through over time. This computation does not include any compensation for the time value of money or other cost of capital considerations. Inclusion of any such items would substantially increase the recovery period.



ALL-STATE LEGAL SUPPLY CO. 1-800-222-0510 EDS11 RECYCLED



Small Cable Business Association

c/o Kinley Simpson Associates
7901 Stoneridge Drive Suite 404 Pleasanton, CA 94588
Phone (510) 463-0404 FAX (510) 463-9627

December 14, 1994

Ms. Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: Going Forward Rules-Small Systems

Dear Meredith:

Thank you for calling yesterday to discuss the "going forward" rules for small systems. Attached is a letter on this same subject which Eric Breisach has sent to Susan Cosentino at her request.

Eric's letter includes the chart we submitted at Susan's request in October, together with a new chart, which uses a 15-year depreciable life for the headend equipment instead of the seven-year life used in the October chart.

As you can see from the chart labeled "December 1994," the monthly subscriber cost attributable to the "headend add-on" would be:

System Size	Monthly Subscriber Add-On
750 subscribers	7 cents
1,000 subscribers	5 cents
1,500 subscribers	3 cents
4,000-10,000 subscribers	1 cent
11,000 subscribers and higher	0 cents

This chart illustrates two points which you and I were discussing. First, the "headend add-on" should not be limited to systems of fewer than 1,000 subscribers. The system of 1,500 subscribers needs to be able to recover that incremental three cents just as much as the system with 999 subscribers needs to recover the incremental nickel. Second, there is no need to "cap" the application of the add-on, because the calculation is "self-limiting." The add-on per subscriber quickly declines to a penny for systems with 4,000 subscribers. For systems of 11,000 and higher, it is zero. Therefore, systems of that size

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would not be entitled to any "headend add-on," and their allowable increase would be limited to 20 cents per subscriber per channel.

I hope these charts illustrate that you can safely treat the headend costs as an add-on, instead of an alternative, to the 20 cents per channel.

Please call if you need any further information about this.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dave", followed by a horizontal line.

David D. Kinley
Chairman

cc: Blair Levin
Mary McManus





December 7, 1994

Small Cable Business Association

c/o Kinley Simpson Associates
7901 Stoneridge Drive Suite 404 Pleasanton, CA 94588
Phone (510) 463-0404 FAX (510) 463-9627

Mr. Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street N.W.
Washington, DC 20554

Re: The "Going Forward" Rules for Small System Operators

Dear Chairman Hundt:

On behalf of SCBA's 374 member companies nationwide, I am writing to express the Association's strong disagreement with the Commission's rules in the Sixth Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, FCC 94-286, released November 18, 1994. As with past Commission actions, the "Going Forward" rules create a significant disparity for small systems. Far from providing the much-advertised incentives for adding channels, these rules do nothing of the sort for small systems.

Largely in response to the efforts of CATA and Steve Effros' letter of November 23, there is widespread recognition at the Commission that these rules as applied to small systems are a serious mistake. Commissioner Ness went so far as to say in a speech at the Western Show last week that the FCC "dropped the ball" in these rules when it came to small systems.

What is just as disturbing is that these rules continue the pattern of not just disagreeing with analyses of small system concerns, but ignoring them. This pattern has now apparently become a *policy of conscious disregard* of the impact of your rules on small system operators. It has already required SCBA to undertake expensive litigation against the FCC in the U. S. Court of Appeals. In fact, with reference to the FCC's obligations under the Small Business Act, the Commission's conscious disregard was so egregious that it triggered unprecedented intervention by a sister agency (see letter to you from Jere W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration, dated July 28, 1994: "Due to the burdens that the [FCC's] regulations impose on small cable operators, the Office of Advocacy is considering the filing of an amicus brief in support of SCBA's intervention in the D.C. Circuit.")

The apparent *policy of conscious disregard* has likewise triggered unprecedented response from Capitol Hill. In a letter dated July 21, 1994, sixteen Senators, fully half the membership of the Senate Small Business Committee, including the new Chairman of the Senate Commerce Committee, urged SBA to intervene against your agency in SCBA's court appeal. Then in a letter to you on September 29, the Congressional Rural Caucus was openly critical of the FCC's treatment of small system operators. The letter urged you and the other commissioners "to ensure that small and rural cable operators are not unduly burdened" by the FCC's rate regulations. In

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an historic high for support, sixty-five members of Congress signed the letter. To our knowledge, this letter from 15% of the House of Representatives remains unanswered.

The interaction between SCBA and the Commission leading up to the Going Forward rules is but the latest example of the apparent *policy of conscious disregard*. The Commission recognized that small systems have a high per subscriber cost for headend equipment because that cost is fixed, regardless of the number of customers served by a headend. The Commission proposed an addition to the rate based on the cost of headend equipment. In October, members of the Cable Services Bureau staff contacted us asking for reaction to the proposed "relief." We were told that the order in the Going Forward rulemaking was to be issued in a matter of days.

We quickly prepared and faxed to the Bureau our analysis. In the analysis, SCBA raised four principal concerns:

1. in order to create parity between small systems and large, the additional cost of headend equipment must be added to the incentives given larger systems (i.e. added to the \$.20 per channel) rather than offered in place of it, because larger systems can and will earn incremental margin using the \$.20 amount, while small systems with higher costs per subscriber will only be allowed to recover the equipment costs
2. our computations showed that the headend cost "add-on" was typically less than \$.20 and that operators of systems with more than 350 subscribers would be foolish to choose the small system option
3. the headend cost recovery should be available to systems with more than 1,000 subscribers because the per subscriber cost remains high for those systems
4. no "subscriber cap" on the headend cost "add-on" was necessary because the calculation was self limiting (i.e., it quickly decreased to less than one cent per subscriber as the number of subscribers per headend increased).

We then reviewed this analysis in detail with the staff in a conference call.

When the Sixth Order On Reconsideration was released, we discovered the Commission had made no changes from its original proposal. In fact, none of the concerns in our analysis were even mentioned, let alone discussed.

As a result, the Going Forward rules enable larger systems to recover their costs and earn additional margin by adding channels to regulated tiers, since headend costs are less than one cent per subscriber for systems with 6,000 or more subscribers. On the other hand, small systems are

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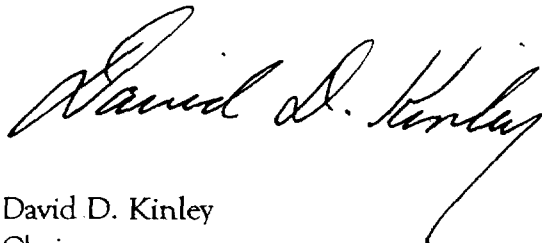
either prohibited from recovering their headend costs altogether or can elect to recover them with a profit of 11.25% on the hardware, but lose the \$.20 per channel, which enables larger systems to recover all their costs, both hardware and programming, and still maintain a mark-up.

We urge the Commission to reconsider this aspect of the Going Forward rules on its own motion. The staff of some Commissioners has indicated they intend to do that. Other staff members insist, however, that a petition for reconsideration must be filed.

In view of the apparent *policy of conscious disregard* discussed above, we doubt that the Commission will take any action on its own initiative. In any event, the deadline for filing a petition for reconsideration in this matter is December 19. We stand ready to work cooperatively with the Commission between now and then to resolve this obvious problem in the Going Forward rules. But the issues detailed in October and ignored in November must be formally considered by the Commission. The only avenue for assuring such consideration is the filing of a petition.

The Commission already has more than sufficient data, from both CATA and SCBA, to act on its own to correct an obvious problem. However, if the apparent *policy of conscious disregard* continues to apply, then SCBA will be forced, once again, to expend time and money to submit its analysis on December 19.

Sincerely,

A handwritten signature in cursive script, reading "David D. Kinley". The signature is written in dark ink and is positioned above the printed name and title.

David D. Kinley
Chairman

cc: Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Meredith Jones
Blair Levin